SCHOOL OF LAW
OBLIG ESSAY
1994/95

CONTENTS

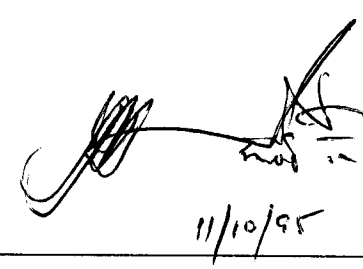
SUPERVISOR'S CERTIFICATE

As one of the compulsory courses to be undertaken by student in their final year of study and in practical fulfillment of the LLB Degree Study programme, this obligatory essay was written by **MUSONDA JUSTIN**, a fourth-year student in the School of Law and of Computer Number 90820681.

During the time of writing the essay the said student constantly liaised with me and I only gave him appropriate guidance where and when necessary.

In view of the above, I certify that I duly supervised this essay in accordance with the regulations of the school governing the said obligatory essay.

NAME OF SUPERVISOR: **MR D. A. BANDA**

SIGNATURE OF SUPERVISOR:  11/10/95

EMPLOYMENT LAW IN ZAMBIA: OVERVIEW

BY

JUSTIN MUSONDA

L411: OBLIGATORY ESSAY

SUMITTED IN PRACTICAL FULFILMENT OF

THE LLB DEGREE

SUPERVISOR: MR D.A. BANDA

DEDICATION

This paper is dedicated to my father Charles Musonda Matemate and my dear mother Tracy Chimbala Musonda

ACKNOWLEDGEMENTS

I would like to thank the following to whom I am greatly indebted.

My nephew Adrian Liempe, my sister Aidah, Roreen and Julie Musonda for their encouragement and support.

Mr D.A. Banda, my supervisor, for his invaluable assistance and advice in the writing of this paper and who also ensured that I came up with something that resembles a legal essay.

My friends Royd Tembo, Pasmal Busenga and Patrick Kasonde without whom my stay at the University would have been dull and unexciting.

Mr I. J. Sinadambwe who is the Assistant Secretary at the Ministry of Labour and Social Services and Mr C.M. Banda, the Librarian at the International Labour Organization Zambia Offices, for kindly agreeing to grant me interviews and who were never too busy to see me at any time to render assistance of any form.

My sister for typing this paper.

However, the above are all absolved from responsibility in the shortcomings of this paper. I entirely remain responsible for any errors or faults in this paper.

JUSTIN MUSONDA

CHAPTER 1

INTRODUCTION

EMPLOYMENT LAW IN ZAMBIA : OVERVIEW

Perhaps before the problem of unfair dismissal is dwelt on it would be logical to understand what is meant by the phrase "contract of employment". It is noteworthy that his phrase is not specifically defined by the employment Act[1] as such although inference can be made from the circumstances of the situation. Nevertheless the Act[2] does not indicate that the expression includes both oral and written and express and implied contracts. This being the position it is left to the courts, in certain cases, to decide what a "Contract of Employment" is.

In the absence of a statutory definition of the expression "Contract of Employment", a working definition may be that a contract of employment is an agreement whereby one party, the employee, undertakes to render to the other party, the employer, under the latter's direction, for a determined or undetermined time, services of physical or intellectual nature, for a consideration which the employer undertakes to pay the employee. In accordance with the orthodox view a contract of service is said to be reached between the employer and the prospective employee. The 'agreement' is supposed to include terms negotiated by the two parties to the

---

[1]Chapter 512 of the Laws of Zambia

[2]Ibid

contract. This may be said to be an orthodox view because in practice the fact of agreement is more apparent than real. In this day and age of standard contracts, for instance, the terms and conditions of service are fixed in advance and presented to the would-be employee on a basis of "take or leave it". Yet the contract of employment should be voluntarily entered into and performed.

Having attempted to give a working definition of a contract of employment it is necessary to briefly examine the validity of the contract of service. For the contract of service to be valid, certain essential requirements must be satisfied by the parties to it before its conclusion. Notable of these requirements are offer and acceptance, capacity to contract, consideration, intention to create legal relations and legality of the contract.

The fact that a contract of employment is intended to be binding on the parties to it clearly suggest that it confers rights to and imposes duties on the parties to it. Meanwhile it must be realized that it is the object of the law to protect the interests of individuals as could be evidenced by the protective provisions enshrined in the Constitution of Zambia[3]. This is usually done by the law commanding people either to do certain things or to forbear from doing certain things. In the employer/employee relationship, the right conferred to either party is defined with reference to

---

[3]Chapter 1 of the Laws of Zambia

duty. In other words, this right should correspond to a legal duty as opposed to a moral duty. These legal rights and duties will be binding on the parties so long as the contract remains enforceable.

Basically the contents of the contract of employment are presumed to have been bilaterally determined by the parties to the contract of employment. Usually the contractual terms will, interalia include the duration of the contract, wages or salary and period of notice to terminate the contract. Notwithstanding the fact that the duration of the contract is pre-determined by the parties either party to the contract of employment may terminate it[4]. Thus it may be claimed that termination is an inseparable incident of a contract of service. This in effect implies that the legal rights given to the parties by the contract are liable to be ended by either party at anytime, for or without any reason, upon giving notice or salary in lieu of notice[5]. This being the position as regards security of tenure of an employee, questions may be asked as to first, whether there is any justification for the employee to assert a right in the job; secondly, whether there are adequate protective measures instituted by the government of Zambia in ensuring that the employee's job is secured against unfair dismissal by the employer.

---

[4]Chapter 512 of the Laws of Zambia

[5]Ibid

I THE ISSUE OF JOB SECURITY

The attraction of calling a right not to be unfairly dismissed a property right seem to lie in the implication that an employee should have security of tenure in his job. As professor Turner once commented on the far-reaching implications of the concept of job property rights he said, "...the employee's right in the job should be seen as the employee's compensation for his relative lack of property in the capital that employs him.[6]" but this is a matter of tenure rights rather than of property rights. Historically, tenure is a holding of land in return for (feudal) services. In the course of time, some tenures achieved a great degree of protection in law, and other tenures evolved into freehold tenure[7]. The various rights of tenure represented a series of tenures from those without security, the tenant at will (i.e. the will of the landlord), to those with total security, the freeholder. Freehold property rights are the most secure form of tenure and give the freeholder the right to recover his specific property itself if dispossessed, the right to sell or otherwise dispose of his property to someone else of his own choosing, and the right to leave it in his will. These rights together with the obvious rights of use and abuse, are those comprising the rights of

---

[6]H.A. Turner, Garfield Clark and Geoffrey Roberts, Labour Relations in the Motor Industry (London: Allen and Unwin, 1967) P337

[7]J.H.Baker, An Introduction to English Legal History (London : Butterworths, 1971 XIII to XVII

ownership of property. The tenant at will has no security; he could be"summarily"turned off his land without rights of recovery or even of damages. In between, classes gradually achieved rights of recovery. The employee was used in law to be in the position of a tenant-at-will, but the law has now given him at least the right to damages for unfair dismissal.

Going by the foregoing discussion,it would appear that if an employee were given further rights of tenure this would imply vesting entirely and permanently in the employee rights of holding that job. This would be tantamount to owning the job so that the employee could not be deprived of it under any circumstances whatsoever except perhaps in extreme cases of being certified lunatic. In other words, there would not be the possibility of dismissing the employee for any reason because If he were dispossessed he could sue in law for specific recovery. Further, he might if he so wished be able to sell his job to someone else, and the job might not cease on his death but pass either to his next-of-kin or to the persons or perhaps persons designated in his will[8].

But the contract of employment is a contract of service and as such the possibility of a fundamental breach of that contract by either party must be admitted as real possibility, and one which could

---

[8]D. Jackson, Unfair dismissal (Cambridge University Press, London, 1975) P 43

render the employee's continuance in employment not feasible. Thus it does not seem realistic that the employee could be given the ownership, or freehold of his job as the talk of property rights would imply. The reality of the worker's situation is that there can be no employment relationship without a power to command and a duty to obey, that is, without this element of subordination. Rather, the contract of employment is and must remain a contract of service. This means that the employee cannot realistically expect a freehold tenure of his job. This being the position, the only thing that can be claimed by the employee is a legal right not to be unfairly dismissed and to enable him to obtain compensation from a tribunal for breach of that right. But what is the legal position on unfair dismissal in Zambia?

II THE CONCEPT OF UNFAIR DISMISSAL

The concept of unfair dismissal is a further step along the path already signposted by Section 108 of the Industrial and Labour Relations Act[9] towards recognition of a man's property right in his job. This concept restricts the hitherto largely unlimited authority of an employer to dismiss his employees for whatever reason he thinks fit, except for reason recognized by the law. Zambia being one of the signatory countries to the International Labour Organization, the new germ of the new concept, so far as Zambia is concerned, is Recommendation 119 of the ILO, approved by

---

[9]No. 27 of 1993

the International Labour Conference at Geneva in 1963[10].

In accordance with the International Labour Organization (ILO) Recommendation 119, the basic principle is that termination of employment should not take place unless there is a valid reason for termination connected with capacity or conduct of the worker or based on the operational requirements of the enterprise. Certain reasons are always to be invalid reasons for termination : participation in Union activities or membership; the taking in good faith of legal proceedings against an employer alleging a breach of some legal obligation; race, colour, sex; marital status, religion, political opinion; national extraction or social origin. Workers who feel aggrieved by an unjustifiable dismissal are to be entitled to a right of appeal. Workers given notice should be given time off from work to look for alternative employment. A dismissed worker should be entitled to receive a certificate from his employers specifying the dates of his employment and the nature of the work done, without containing anything unfavorable to the worker concerned. Dismissal for serious misconduct should take place only where the employee could not reasonably be expected to take any other course. Proper rules should be laid down for the selection of workers to be dismissed where economic necessity requires a reduction in the labour force. Re-instatement of workers unfairly dismissed appears to be the Recommendation's

---

[10]Report of the International Labour Conference, 47th Session, Geneva

preferred solution where an invalid dismissal occurs. In the absence of reinstatement adequate compensations is to be paid[11]

It must be pointed out at this stage that the important ILO Recommendation No., 119 that termination should not take place unless there is a valid reason has not been without difficulty as regards implementation. This may be said to have stemmed from the problem of defining the expression "unfair dismissal" in legal terms.

III THE DIFFICULTY OF DEFINING UNFAIR DISMISSAL

Admittedly, there is a problem in defining the concept "unfair dismissal". The vagueness as to where the line is to be drawn between a fair and unfair dismissal lies in the fact that it is impossible to say with accuracy what reasons are substantial or valid to merit dismissal. For instance even if a dismissal was for a reason considered to be valid or substantial by the employer, such a dismissal should still be regarded as unfair if in the circumstances the employer has acted unreasonably in treating it as a sufficient reason for dismissing the employee. Equally uncertain are the circumstances that may be taken into account. Consider, for instance, the case of an employee dismissed for bad time-

---

[11]Recommendation 119 in the Report of the International Labour Conference, 47th Session, Geneva, 1963 as re-stated by B.A. Hepple and P.O'Higgins, Individual Employment Law (Sweat and Maxwell, London, 1971) P134

keeping. Prima facie this dismissal is related to the conduct of the employee and may therefore be regarded as a fair dismissal. But if the facts were such that the employee had been only two minutes late on a single occasion and has a good record for time-keeping in the past, these presumably would be circumstances making it unreasonable for the employer to treat the employee's late arrival as a sufficient reason for dismissing him. Circumstances therefore, would appear to include the seriousness of the employee's misconduct as could be illustrated in the case of Zambia Union of Financial Institutions and Allied Workers (On behalf of their member Mr M. Chimgambo) v Workers Compensation Fund Control board (1981)[12]

In this case, the case was brought before the Industrial Relations Court by ZUFIAW on behalf of their member against the Board on grounds that their member Mr Chingamba was unfairly dismissed from his job. However, it because apparent after hearing evidence from both sides that the termination of the applicant's services were in accordance with the terms of the Collective Agreement. The Collective Agreement required either party to give one month;s notice in case of termination of employment or one month's salary in lieu of notice.

The Respondent paid one month's salary in lieu of notice which the applicant accepted. The Union argued that under Clause 19 of the Collective Agreement the applicant should have been given a chance

---

[12]Application No. 66/81

to exculpate himself before termination of his services. After examining the provision in question, the court agreed with the Union but argued that the relief being sought by the applicant was equitable and at the discretion of the court. That failure to give the applicant chance to exculpate himself could not be said to have been unfair, for the applicant was guilty of theft, which was a serious offence with serious penalty. So the application was dismissed as without merit.

It is noteworthy, however, that the employee's misconduct should also allow account to be taken of any reason the employee might have to offer for his misconduct. It should further be emphasized that the concepts of "fair" and "unfair" dismissal should not necessarily be connected with the rules which are supposed to determine the question whether or not the reason for dismissal is such as would justify summary dismissal of the employee concerned. It would be possible, though no doubt exceptional, for a reason justifying summary dismissal at common law not to be a reason constituting a fair dismissal. The giving of notice does not of itself make what would otherwise be an unfair dismissal a fair dismissal. Equally, lack of notice, even where the common law demands it, will not automatically make the dismissal an unfair dismissal[13]

---

[13]B.A. hepple and P O;Higgins, International Employment Law (sweet and Maxwell, London, 1971) P. 137

IV CLASSIFICATION OF UNFAIR DISMISSAL

It is by appealing to the consideration of equity that a solution to the problem of obtaining an operational classification of unfair dismissal can be obtained. The term "equity" is not one with a clear and specific definition. But perhaps Aristotle's discussion of equity remains the best and most relevant; it is worth quoting extensively because it goes to the heart of the problem of using the law in industrial relations:

> "What puzzles people is the fact that equity, though just, is not the justice of the law of the courts but a method of restoring the balance of justice when it has been tilted by the law. The need for such a rectification arise from the circumstance that law can do no more than generalize, and there are cases which cannot be settled by a general statement... the data of human behavior simply will not be reduced to uniformity...equity essentially is just this rectification of the law where the law has to be amplified because of the general terms in which it has to be couched. This in fact is the reason why everything is not regulated bylaw; it is because there are cases which no law can be framed to cover and which can only be met by a special regulation. It is useless to apply a definite yardstick to something indefinite.."[14]

---

[14]Aristotle, Nichomachean Ethics, Books, Chapter ten (in the translations by J A K Thomson, The ethics of Aristotle (Harmondsworth:Penguin, 1955) PP 166-7; restated by D. Jackson,

Although it is difficult to give judicial process criteria on which to decide whether any particular dismissal should count as unfair, it is justifiable that both the employer and employee be provided with some form of rough guide outlining principal reasons for justifying dismissal.

Once again section 108 of the Industrial and Labour Relations Act[15] restricts the employer from discriminating against the employee on the ground of race sex, marital status and so forth. But this prohibition on the employer seem to be too narrow to be of any advantage to the employee. The provision, if literally construed, does not seem to protect the employee whose services are terminated with reference to capability or qualifications, conduct and other reasons. If the grounds in the Act[16] were extended to cover as many as possible it would be easy for the affected employee to invoke his right not to be unfairly dismissed by referring to the Act[17].

Whilst admitting that collective Agreements have a force of law[18] and hence capable of covering formal dismissal procedures, it does not seem to cover all employees in Zambia whose employers are

---

Unfair dismissal (Cambridge University Press, London, 1975) P. 19

[15]No. 27 of the 1993

[16]No. 27 of 1993

[17]Ibid

[18]Ibid. Part VII and VIII

registered with the Commissioner of Labour. Section 63 of the Act[19], for instance requires every employer employing more than twenty-five or more eligible employees, or such lesser numbers as may be prescribed by the minister to register with the commissioner of Labor within three months from the date of coming into operation of the section, or from the date upon which the section becomes applicable to the employer, as the case may be. Further,Section 3 of the Act defines eligible employees as meaning unionized employees other than member of the management of an undertaking. From the interpretation of both these Sections, it may be inferred that employers employing less than twenty-five employees are not compelled by the Statutory Law to enter into Recognition and Collection Agreements with their employees. Since the employees for these employers are not protected by the Recognition and Collective Agreements, the only recourse they may have is to either statutory or common law. But since Zambia has no specific legislation an unfair dismissal, employees who are not protected by Collective Agreements have their rights of tenure threatened. The right of an employee to belong to a Trade Union is expressed as a matter of choice by section 5 of the Act[20]. However, in the absence of there existing legislation on unfair dismissal the employees have no choice but compelled to join Trade Unions in order to ensure that their rights not to be unfairly dismissed are protected.

---

[19]Ibid

[20]Industrial and Labour Relations Act, 1993

On the other hand, it is interesting to point out that an inquiry made at the Ministry of Labor and Social Services on 17th May, 1995[21], revealed that among the formal employers in Zambia, the Government has the least number of dismissals per annum. This is evidence enough that there is more security of tenure of jobs in the government than in the private sector. This it was pointed is attributed to the fact that disciplinary procedures contained in the Collective Agreement are strictly observed. Illustrative of this point is the case of The People v Kangombe (1972)[22]. Brief facts of this case were that a primary teacher was wrongfully dismissed by the then President of Zambia on recommendation of his subordinates when the proper authority to take such action was the Teaching Service Commission. It was held that the teacher dismissed should be re-instated because the statutory laid-down procedure was not followed in the dismissal.

---

[21]Interview with Mr S Sinadabwe, Assistance Secretary at Ministry of Labour and Social Services held on 17th May, 1995.

[22]Z.R.

CHAPTER 2

I REMEDIES FOR UNFAIR DISMISSAL

Legislation and a system of adjudication would not be said to be of much use if it failed to give much or adequate redress to a complainant who has a just grievance. If the dismissal is found to be unfair, the court may recommend re-instatement. In the alternative the court may make an award of compensation. Sub-Section 3 of Section 108 of the Industrial and Labour Relations Act provides that the court shall, if it finds favours of the complainant (a) grant to the complainant damages or compensation for loss of employment; (b) make an order for re-employment or

reinstatement in accordance with the gravity of the circumstances of each case.

1. REINSTATEMENT AND RE-ENGAGEMENT

In Zambia the Industrial Relations Court has original jurisdiction in all industrial relations matters as provided for under Section 85 of the Industrial and Labour Relations Act, 1993[23]. Section 85 (3) of this Act defines 'dispute' as including differences concerning employment contract between an employer and an employee arising from the terms and conditions of service. Further sub-section 4 of section 85 of the same Act empowers the Court to hear and determine any dispute between any employer and employee notwithstanding that such dispute is not connected with a collective agreement or other trade union matter. Moreover, Section 97 of the Act[24] provides for appeals from the Industrial Relations Court (IRC) to the Supreme Court.

Having identified these provisions of the Industrial and Labour Relations Act[25], it may be said that both the Industrial Relations Court and the Supreme Court have jurisdiction to entertain industrial disputes concerning unfair dismissal for the affected employee.

---

[23]No 27 of 1993

[24]Ibid

[25]Ibid

If the order is for re-instatement, the employer should treat the employee in all respects as if he had not been dismissed and the court may specify the amount of arrears in pay payable to the employee, and the rights and privileges, including seniority and pension rights, which must be restored to him, and the date by which the order must be complied with. If the employee would have benefitted any improvement in his terms and conditions of employment had he not been dismissed, the order should require him to have those improvements. If on the other hand the Court orders re-engagement, this is an order that the employee be re-engaged by the employer or by his successor, or an associated employer, in the employment, comparable to that from which he was dismissed or other suitable employment. The court has to specify the terms on which re-engagement will take place, stating the identity of the employer, the nature of the employment, the remuneration, any arrears of pay, any rights or privileges which must be restored to him (including seniority and pension rights) and the date by which the order must be complied with. In either case the court makes an order irrespective of arrears of pay, it will take into account (for the purpose of reducing the employer's liability) any sums reduced by the applicant between the date of dismissal and the date of re-instatement or re-engagement by way of wages in lieu of notice, ex gratia payments, remuneration received from another employer, social security benefits and any other benefits as the court may think appropriate.

(i) DIFFICULT IN ORDERING RE-INSTATEMENT OR RE-ENGAGEMENT

It must be pointed out at this stage that although strict interpretation of section 108 (3) (b) seems to make it compulsory for the employer in fault to have the unfairly dismissed employee re-instated or re-engaged, this remedy in reality has limitations for various reasons. It must be stressed that the court has a discretion in making an order for either re-instatement or re-engagement, There are various considerations that must be taken into account before such an order in made by the court, First, the court has to consider whether the applicant wishes to be re-instated or not. It would be harmful to the employer if such an order were made yet the employee to be re-instated or re-engaged has no wish nor interest to continue working for the employer. In other words, a demotivated employee would not be productive.

Secondly, it should be considered whether it is practical for the employer to comply with the order for re-instatement or re-engagement. This appears to be the main restriction on making reinstatement or re-engagement order. However, if a permanent replacement has been engaged in place of the dismissed employee, the court should not take this into account for the purpose of deciding whether it was practicable for the employer to comply with the order unless the employer shows:

(a) that it was not practicable for him to arrange for

the dismissed employee's work to be dome without engaging a permanent replacement, or

(b) that he engaged the replacement after the lapse of a reasonable time without having heard from the dismissed employee that the wished to be re-instated or re-engaged, and that when the employer engaged the replacement, it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement[26].

Further more, it should be noted that the term "practicable" does not mean "possible". Thus the orders are unlikely to be made if the dismissal is in a redundancy situation; the applicant is unfit for work or if there is some friction or personal animosity either with the employer or with fellow-employees. This point could be illustrated by a Zambia Supreme Court case of Pamodzi Hotel v Godwin Y Mbewe (1987)[27] where in delivering judgement it was emphasized that "a declaration that a dismissal is null and void followed by an order for a re-instatement is a discretionary remedy and courts should always consider carefully the remarks of Lord Morris of Brothy-Gait in the case of Francis v

---

[26]N M Selwyn Law of Employment 3rd Edition 1980 Butterworths London P. 247

[27]SCZ Judgement No. 4 of 1987

Municipal Councilors of Kuala Lumpur (1962)[28]:- 'In their lordship view, when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still exists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of a contract of service. However, as an exception to this general rule, the courts will often rule against wrought dismissal and declare that the employee be restored to his status quo. Typical of such a situation is where the employer terminates the employee's employment for a disciplinary offence but without the former following statutory law or some or all the disciplinary procedures provided for in the Collective Agreement. The Collective Agreement has in effect a force o flaw and therefore binding on the parties to it, as could be illustrated by the case of Contract Haulage v Kamayoyo (1968)[29]. In this case the appellant appealed against a declaration by the High Court to the effect that the purported dismissal of the respondent by the appellant was null and void; in which case the respondent would be entitled to re-instatement. The appellant argued that the employment was under a master and servant contract; if the respondent was wrongfully dismissed he was entitled only to damages, and there was no question of natural justice being applicable and thus the dismissal was not null and void. . It was held by a the Supreme Court that where there is statute which

---

[28]3 Aller 633

[29]2.R

specifically provides that an employee may only be dismissed if certain proceedings are carried out and then an improper dismissal is ultra vires; and where there is some statutory authority for a certain procedure relating to dismissal a failure to give an employee an opportunity to answer charges against him or any other unfairness is contrary to natural justice and a dismissal in these circumstance is null and void. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the courts."

A further basis for the court finding non-practicability of re-instatement or re-engagement may be, in the case of an order of re-instatement to a particular job, where the employee is not fit to do the job either because of incompetence or ill health but the manner of the dismissal is found to be unfair. This however, will not prevent the court from investigating the possibilities of re-employment in other comparable employment, or from re-considering re-engagement at a future point of time when the individual's incapacitating illness has been cured.

Moreover, if the employer is a small firm, with few staff, re-instatement or re-engagement could only be ordered in exceptional circumstances as there is a close relationship between the parties which may make such an order impracticable.

Similarly, there is clearly no basis for an order of re-

instatement where the job itself has disappeared owing to redundancy, at least where the work place has closed down. Where the dismissal from redundancy is a case of unfair selection, the court may exercise discretion. The Industrial Relations Court may under Section 108 of the Industrial Relations and Labour Act[30] order re-instatement even where there is no existing vacancy if it considers that one is likely to arise in the near future. Rather this section does not require the court to be completely satisfied that an order is practicable before it is made. Instead the section will only oblige the court to take into account the practicability of the order. The one issue upon which the court's discretion is specifically curtailed, however, is the issue of when a replacement makes re-instatement impracticable[31].

On the whole, the practicability of ordering re-instatement or re-engagement must be looked at in a subjective and pragmatic sense, bearing in mind the particular circumstance of the case. And in practice, very few re-instatement or re-engagement orders are made as very few applicants request this remedy.

(ii) **CONTRIBUTORY FAULT AND RE-INSTATEMENT AND RE-ENGAGEMENT**

---

[30]No 27 of 1993

[31]Steven D. Anderson The Law of Unfair Dismissal 2nd Edition 1985 London Butterworths P. 284

Where a court finds that an employee has caused or contributed to some extent to the dismissal, it must also consider this factor in determining whether it would just to order re-instatement or re-engagement. In the case of an order for re-instatement the Court may only take into account the employee's degree of "fault when considering whether or not to order re-instatement; it has no discretion to take into consideration that factor in deciding the terms of re-instatement. IN the case of re-engagement, however, the court may take into account contributory, fault in setting the terms on which to make the order. But in all other cases it must provide terms which are "so far as reasonably as practicable as favorable as an order of re-instatement.[32]"

(iii) **PENALTY FOR NON-COMPLIANCE WITH COURT'S ORDER**

Although the remedies of re-instatement and re-engagement take the form of orders, the penalty for non-compliance is exclusively financial. In a case where an employer has re-instated or re-engaged an employee in response to an order but the compliance is only partial in any respect, the Court must make an award of compensation which it considers to be fit having regard to the loss sustained by the employee as a consequence of the employer's failure fully to comply with the terms of the order.

(iv) EQUITY AS AN EXCEPTION TO THE REMEDY OF REINSTATEMENT

---

[32]Ibid P. 285

From the foregoing discussion it has been established that re-instatement and re-engagement are ordered at the discretion of the court. This being the case they may be said to be equitable remedies which will be ordered by the court upon consideration of doctrines of equity. But the term 'equity is relative and difficult to be defined and applied with accuracy. The dependence in re-instatement or re-engagement order by the courts on the doctrines of equity may be said to place a limitation to the remedies available to the unfairly dismissed employee. This could be the major reason why re-instatement or re-engagement orders are rarely made by the court.

2 COMPENSATION AND DAMAGES

Although re-instatement and re-engagement may be regarded as the primary remedies of the Act[33], in practice the effective remedy for the overwhelming majority of unfair dismissals is some form of compensation. Section 108 (3) (a) of the Act[34] empowers the Industrial Relations Court, once it finds in favour of the unfairly dismissed person, to grant the latter damages or compensation for loss of employment. Thus where a recommendation of re-instatement or re-engagement, as provided for under section 108 (3) (b) of the Act[35], has not been fully complied with, the court must make an

---

[33]Industrial Relations and Labour Act 1993

[34]Ibid

[35]Ibid

award of compensation by invoking Section 108 (3)(a) of the Act[36]. The amount of compensation will be determine din accordance with certain principles. Ordinarily the amount is to be such as the court "considers just and equitable in all the circumstances having regard to the loss sustained by the aggrieved party in consequence of the matters to which the complainant relates, in so far as the loss was attributable to action taken by or on behalf of the party in default."[37]

The loss sustained by the complainant should include (a) any expenses reasonably incurred by him in consequence of the matters to which the complaint relates, and (b) loss of any benefit which he might reasonably be expected to have had but for those matters, subject, however, to the application of the same rule concerning the duty of a person to mitigate his loss as applied in relation to damages recoverable under the common law of England. Thus it is important that steps are taken by the claimant to mitigate his loss for the amount of compensation will be largely determined by the amount for mitigation.

Although Section 108 of the Act[38] seems to protect the employee who has been unfairly dismissed, it does not expressly

---

[36]Ibid

[37]B.A. Hepple and Paul O' Higgins, An Introduction to Individual Employment Law, London Sweet an Maxwell 1971 P. 143

[38]Industrial and Labour Relations Act 1993

provide for that. The effect of this section in relation to compensation of the unfairly dismissed employee should be two fold. First of all it must be possible to recover compensation for loss of a prospective benefit which may not be recoverable at common law. Secondly, the duty of mitigation couples with the fact that compensation is not given for loss of a job per se, but only for the consequential loss measurable in monetary terms which flow from the loss of a job,means that, if a dismissal occurs in such circumstances that there is alternative suitable employment readily available for the employee, he must recover little or nothing n the way of compensation as he may have suffered (or of he fails to take alternative employment need not have suffered) any financial detriment due to his loss of employment.

Recommendation 119[39] seems to envisage compensation for loss of job per se. But it is unlikely that the principle of compensation for loss of the job itself, as opposed to consequential loss may ultimately be adopted as a standard for compensation for a job lost as result of an unfair dismissal. Where the court has recommended re-engagement or engagement of the complainant and the recommendation is not complied with, this fact ought to be taken into account in fixing the amount of compensation. If the reason for non-compliance is the un

---

[39]Report of the International Labour Conference, 47th Session, Geneva. 1963

willingness of the complainant to be re-engaged or engaged, the court must reduce the amount of compensation payable to him if it considers his action unreasonable. If non-compliance is due to the employer's unwillingness the amount of compensation ought to be increased if the court considers his action unreasonable.

II RELATIONSHIP BETWEEN UNFAIR DISMISSAL WITH OTHER CLAIMS ARISING OUT OF DISMISSAL

I WRONGFUL DISMISSAL

The Industrial Relations and Labour Act[40] contains no specific provisions dealing with the relationship of a claim for damaged for wrongful dismissal and a claim for compensation for unfair dismissal. In principle the two claims are cumulative in the sense that a prior claim for damages for wrongful dismissal will not debar a subsequent claim for unfair dismissal. But if damages are awarded in respect of the first claim, these will probably be taken into account by the court in assessing compensation for an unfair dismissal, because it is required to make an award of such amount as is just and equitable in all circumstances. On the other hand, if the first claim brought is for an unfair dismissal and such claim is successful, in making an award by the court of an amount which is "just and equitable in all the circumstances", the court is likely to take account of the

---

[40]No. 27 of 1993

fact that the dismissal took place in such circumstances as to constitute a wrongful summary dismissal. If this is right thecourt before whom a subsequent claim for wrongful dismissal is brought might take the view that in consequence of his successful claim before the court that plaintiff can prove no outstanding loss flowing from the wrongful dismissal; he may not recover twice in respect of the same injury.

It should be pointed out at this stage that a claim for compensation for wrongful dismissal, as opposed to unfair dismissal, is for the High court to entertain and not the Industrial Relations Court. This could be illustrated by the remarks made in the judgement of the case between Musokotwane v President Citizenship College (1981)[41] , where among other claims, the applicant claimed for compensation for wrongful dismissal. The holding as regards this issue was that and I quote "As the Court has said from time and again, the court has to repeat itself that cases of wrongful dismissal are entertained in the High Court and not in the Industrial Relations Court." Hence the application was dismissed by the Industrial Relations Court.

Further, it must be stated that wrongful dismissal may be said to arise where established or laid down procedures agreed to by both employer and employee are not followed by the former when effecting the dismissal. On the other hand, unfair dismissal may

---

[41]Application No. 60 1981 of the IRC

be said to arise where the reason advanced by the employer for terminating the employees, services are not valid.

2. REDUNDANCY

The term redundancy in the phrase "dismissal by redundancy" may be said to arise in the following ways:

(i) When the employer has ceased or is intending to cease carrying on the business for the purpose which he employed the employee.

(ii) When the employee has ceased or is intending to cease to do business in the place where the employer is employed.

(iii) When the requirement for the employer's business for the employee doing a particular job have diminished or ceased or are expected to be diminished or cease or finish in the place where the employee is expected to be employed.

In other words redundancy can only occur either where the business or employer or enterprise at a particular place has ended or if the individual employee's part is no longer necessary.

However, although a redundancy situation may be a ground for

dismissal, in respect of which the employee may be able to obtain a redundancy payment, it does not follow that such a dismissal will automatically be fair, or that the employer acts reasonably in treating that reason as a sufficient ground for dismissal[42].

It is worth noting that in Zambia there is no specific legislation on redundancy. Yet redundancy has been a common feature and a ongoing exercise initiated by the Zambian government since the present regime came into power in 1991. The absence of there being legislation on redundancy in Zambia implies that the obligation of an employer faced with a redundancy situation must be drawn from common law principles by virtue of Cap 4[43] of the Laws of Zambia, as well as those created via Collective Agreements which are entered into between the employer and a particular trade union to which the affected employees belong.

Despite the fact that redundancy may be claimed to be fair reason for dismissal it is wholly or mainly attributable to the reasons afore-mentioned, it must be subject to certain conditions for it to be considered fair. Amongst these conditions are that first, the method of selecting employees for redundancy must be fair. Secondly, in the absence of specific legislation on redundancy the

---

[42]Norman M Selwyn Law of Employment Butterworths 3rd Edition 1980 London P. 220

[43]English Law (Extent of Application) Act 4 of the Laws of Zambia

requirment of the Common law on redundancy must be fulfilled . Thirdly, the provisions of the Collective Agreement relative to redundancy must be recognized and accordingly implemented. Thus, where the foregoing conditions are not met, the employee dismissed by reason of redundancy may contest the dismissal as being unfair and seek relevant relief of either re-instatement or compensation as provided for under Section 108 of the Act[44]. To illustrate this point is the case of Kazunga v City Radio Refrigeration Supplies (1975 Limited (1981)[45] Brief facts of this case are that the applicant was employed as Head of Security in 1978. In 1980 the applicant attended to a meeting of the National Union of Commercial and Industrial Workers where he learnt that some members of his department, excluding him, were listed for redundancy. Two months later the applicant received a letter summarily terminating his services by reason of redundancy. Although management had sought permission to effect redundancy exercise, the applicants Union was not informed nor consulted for approval of its member's termination of service. Upon invocation of a provision similar to section 85 (1)(C)[46] of the current Act, it was held that the decision of the company to declare the applicant redundant without approval of the Union was null and void ab initio and it was of no effect. Thus applicant was re-instated and entitled to arrears of salary from the date of his purported termination of employment to the date of

---

[44]Industrial Relations and Labour Act of 1993

[45]Application No. 48 of 1981 of the Industrial Relations Court

[46]Op Cit

judgement.

It follows therefore that failure to observed procedural provisions of the Collective Agreement which concerned redundancy may result in an unfair dismissal against the employer.

In conclusion it may be said that there seems to be two main remedies for unfair dismissal namely, re-instatement or re-engagement on one hand and damages or compensation on the other. However, former remedy is equitable, for it is granted at the discretion of the court and it may only be granted after the court has considered its practicability if ordered. As for the latter remedy the affected employee must take steps to mitigate the loss he has suffered as a result of the unfair dismissal.

Zambia became a member of the International Labour Organization in 1964,and since then out of the 38 conventions attended, she has ratified a total of 37[47]. The latest relevant convention ratified by Zambia is Termination of Employment Convention which Zambia attended in 1982 during the 68th Session in Geneva in 1982 but ratified in 1985. As member of the ILO the country has and is attempting to bring all her labour laws in conformity with ILO conventions, especially if it has to be

---

[47]International Labour Conventions and Recommendations 1994 Year Book of Labour Statistics P 271

considered a "good country" by the International community[48]. It must however be stated that the ILO sanctions are not binding since they form part of International laws as opposed to Municipal laws which are binding.

---

[48]Interview held with Mr C.M. Banda, Librarian of the International Labour Organization (ILO) Zambia Office on 29 June, 1995.

CHAPTER 3

I WHAT AN INDUSTRIAL TRIBUNAL IS

According to the "Advanced Learner's Dictionary of current English"[49] a tribunal is defined as a place of judgement or board of officials or judges appointed for a special duty such as to hear appeals. From this definition, an industrial tribunal may be said to be a body of officials or judges appointed to hear and determine employment related issues. Much often an industrial tribunal is the court of first instance in a dispute between two individuals, although one of the 'individuals' will often be a company. In such cases the applicant will normally be an employee, ex-employee or an applicant for employment and the respondent an employer but not always. Whilst all industrial tribunals have some connections with 'employment' they form a very mixed bag. Thus industrial tribunals have an appellate jurisdiction against all forms of employment discrimination.. Further, complaints about alleged discrimination may be brought not only against an employer but also against the individual, manager, supervisor or other agent who took the illegal decision on the employer's behalf. Hence a respondent need not be the employer. It follows, therefore, that the industrial tribunal is not concerned with employee-employer dispute. It also concerns

---

[49]A.S. Hornby, E.V. Gatenby, H Wakefield, The Advanced Learner's Dictionary of Current English, 2nd Ed. 1970, Oxford University Press, London, P.1078

other employment areas such as those provided for under Section 108 of the Industrial and Labour Relations Act.[50]

One argument against such extension, however, is that it would move tribunals out of the area for which they were created and designed to deal, that is, the enforcement of specific statutory rights into a more general common law area, such as the law of contract. However, whatever validity this argument may seem to have is disputable and debatable. This may be said to be so because as soon as entitlement to a statutory right is stated by the statute concerned to be dependent on the existence of a 'contract of service' the industrial tribunal has to look at the common law concerned with contract to determine whether an applicant is entitled to claim that right.

II JURISDICTION

The situation obtaining in Zambia now is that legal actions are many, the number of legal claims is increasing and the law is becoming far more complex. On the other hand lawyers and consultants can only advise the employees who have to decide whether or not there is an advantage in suing. Meanwhile, the law is rarely hundred per-cent ceratin.. Rather the purpose of the law is to set a minimum and devise means of dealing with the fall-back situation when parties cannot reach a solution.

---

[50]No 27 of 1993

Given this kind of situation it is difficult for one and only Industrial Relations Court (Industrial Tribunal) to cope with the ever-increasing legal claims that are bound to be made by the parties to the contract of employment. To contain the situation, the extension of employment statutes is inevitable. Moreover, legislation to enable establishment of many industrial tribunals should be made.

III MERIT OF INDUSTRIAL TRIBUNALS OVER REGULAR COURTS

Industrial tribunals may be claimed to have certain characteristics which are bound to give them advantages over the regular courts. In other words, there are special considerations that should lead to such extensive delegation of employment matters to tribunals rather than the regular courts. The characteristic which it is believed can give tribunals advantages over courts are in brief, cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject, to mention but a few.

1 CHEAPNESS

One reason why industrial tribunals may be said to be cheaper in the determination and resolution of the matter put before them is that there are fewer procedural technicalities. They are not bound by complicated rules about how cases should, before hearing,

be defined on paper. Their proceedings are less formal. Any applicant or respondent may appear in person or be represented. the need for legal representation and for the expense of it is thus reduced. In addition, there are no Court fees as in ordinary courts of law. And only in exceptional cases is the loser required to pay the winner;s costs.[51]

2. LACK OF TECHNICALITY

Lack of technicality and reduction in actual or potential expense, in turn is bound to increase the tribunal's accessibility., Potential litigants are less likely to be frightened off by legal Mumbo jumbo and the prospect of huge lawyer's fees. the Industrial tribunal will provide simple standard forms on which applicants can make and respondents can reply to complaints.

3. EXPEDIENCY

The speed or quickness with which tribunals are found to deal with cases may be also influenced by their lack of technicality. Where there are no pre-trial procedures a case can be heard as soon as an application and a response to it have been received and a tribunal is available to hear it. However, the lack of pre-trial

---

[51]Olga Aikin, R Greenhalgh, Law and Employment, 1st Edition 1992, Cromwell Press Ltd, Wiltshire p. 7

procedures may sometimes mean that cases take longer to hear than where the issues have been more sharply defined before a hearing begins, which in turn may mean that other cases must wait longer to be heard. But that effect is bound to be diminished by the tribunal, where it seems necessary, itself requiring further particulars to be given or modifying the procedure at the hearing[52]. by taking these measures, the case load on industrial tribunals is likely to be decreased and so the speed with which they can deal with industrial cases may be increased. By vetting applications, by pre-hearing assessments and by the involvement of conciliation, officers would try to dispose of cases without any need for them to be heard.

4. SPECIALIZATION

Specialization is one of the most obvious aspects of an industrial tribunal. and it appears to be the main distinguishing feature between the ordinary courts and the policy oriented type of tribunal such as the Industrial Relations Court.[53]

5. SIMILARITIES

It is noteworthy that both courts and industrial tribunals must be established under statutes. Similarly, both interpret the

---

[52]Ibid p.9

[53]Ibid P.8

laws made by or under statute as well as their own case law, although the latter may be more flexible in certain situations.

6. DIFFERENCES

Industrial tribunals tend to be informal with a view to creating an atmosphere in which people who appear in person will not feel it at ease or nervous.

The rights of appeal in the case of an industrial tribunal are not restricted as in ordinary courts. Regular Courts can normally take cognizance of the rights of appeal to allow appeal if it can be shown that a tribunal concerned clearly violated the lawyer's concept of 'natural justice'. In general however, appeals from the policy - conscious tribunal will be slotted into the court structure at various levels. In the Zambian situation the Industrial Relations Court like the High Court for Zambia is subject to have its award, declaration, judgement or decision reviewed only by Supreme Court for Zambia. Thus Section 97 of the Act[54] provides that any person aggrieved by any award, declaration, decision or judgement of the Court[55] may appeal to the Supreme Court on any point of law or any point of mixed law and fact.

7. COMPOSITION

---

[54]Industrial and Labour Relations Act, 1993

[55]Ibid

Some of the industrial tribunal's expert knowledge of their particulars subject derives from their member's specific training for their roles and their continued exposure to cases. More, in the case of 'lay members' who in accordance with Section 88 of The Industrial and Labour Relations Act[56] are known as assessors, comes from their background. the court or tribunal hearing a case has three members. One in the chair is a lawyer, a barrister or solicitor of at least seven years standing, as provided for under Section 86(2) of the Act.[57] The other two are not legally qualified but must have experience of employment either from the employer's's or from the employee's point of view. There are tow panels o such members: one consisting of people recommended by Trade union, the other of people recommended by employer's organization. One person from each panel will join the legally qualified chairperson to form the tribunal.

The mix of individuals will vary from case to case. Thus the same legally qualified chair may sit with different lay members on different days and the same two lay members will not always sit together. Obviously, the same three members will sit together throughout the hearing of one case, even if the hearing takes place over many years. The precise composition of any tribunal, in terms of individuals, is a function more of administrative convenience and the availability of members than of picking horses

---

[56]No 27 of 1993

[57]Ibid

for courses.[58]

Although lay members of an industrial tribunal are expressly drawn from two panels they are not expected to represent any sectional interest. They are expected to decide the case before them objectively, having regard to the strength of the evidence and legal arguments advanced by both sides. This point could be supported by Section 89 (4) of the Act[59] which states that, "A person shall not sit or act as a member of the Court or sit as an assessor with the Court, if he has any interest direct or indirect, personal or pecuniary, in any matter before the court".

8. CONSTRAINTS

It must be pointed out, however, that the speed with which the Industrial Relations Court can deal with cases and how much case costs parties to pursue are significantly influenced by other factors. The resources the state devotes to the provision and funding of the Court or tribunal itself and the extent and type of jurisdiction with which the state expects it to deal. In short, it is a state provided service which sots money.

It would be made cheaper for the parties by extending legal

---

[58]Olga Aikin, Roger Creenhalgh, Law and Employment 1st edition 1992, Cromwell Press Limited, Wiltshire p.10

[59]Op. Cit

aid to tribunal representation. Cases are bound to be heard more speedily by funding more appointments as tribunal members and staff. Either course would require more public money to be devoted to the service. Unless and until such extra money is allocated for the purpose the tribunal has to operate within its means.

CHAPTER 4

RECOMMENDATIONS AND CONCLUSION

I RECOMMENDATIONS

With the laissez-faire economy prevailing in our country dismissal related cases have become prevalent. In view of this kind of situation obtaining and the fact that there is only one Industrial Relations Court, which in essence is a tribunal, to hear and determine interalia dismissal related cases, there is need for the Government to decentralize the operations of the said Court so that each Province in Zambia is adequately provided with service offered by the court. In the alternative, members of the court should be made to go on a circuit from one provincial center to another to hear and determine dismissal relations case in those places. Apart from being cheaper on the part of the complaints who at the present have to travel to the only Industrial Tribunal in Lusaka, the establishment of similar courts or tribunals in provincial centres would ensure accessibility and speedy disposition of the cases in issue.

In determining a complaint of unfair dismissal four principle tests may be said to be involved. The first two may be said to concern the preliminary requirements which are necessary for the presentation of a valid complaint of unfair dismissal. That is whether the complainant is eligible to present a complaint or in precluded by the various qualification and exclusions

relating to classes of employment, length of service, age and so forth. The second test may be said to be whether the employee was dismissed and it so when. If the employee's claim meets the preliminary requirements the court then should go on to pose the question of fairness of the dismissal. That is, whether or not the employer has satisfied the court that in the circumstances he acted reasonably in treating his reasons as sufficient to justify the dismissal.

Finally, if the employee has been found to be unfairly dismissed the court must decided to what remedy the employee should be entitled. That is, whether the employee should be entitled to re-instatement, re-employment or compensation[60].

To these safeguards against unfair dismissal need to be included the following statutory requirements:

1. WRITTEN STATEMENT OF REASONS FOR DISMISSAL

The introduction of a requirement that the employer must provide a dismissed employee on request with a written statement of the reasons for dismissal. For all employees dismissed after continuous service, whether the dismissal was with or without notice or consisted of the expiry and non-renewal of a fixed-term

---

[60]S.D. Anderman, Employment Protection, Buterworths, 1st Ed. London, 1976. p.14

contract, there is need to be introduced a right upon request to a written statement of particulars of the reasons for the dismissal within a reasonable time. If the employer unreasonably refuses to provide a written statement or if the written particulars are inadequate or untrue, the employee should have an option to present a complaint to the Industrial Reactions Court. the employers must give particulars of the reasons, that is to say, a statement of the main factual grounds for the dismissal. Where the court decides that an employee's complaint concerning the inadequacy of the written statement is swell-founded, it should in its discretion make a declaration as to what the employer's reasons for the dismissal were as well as make an award to the employee. This ward against the employer in respect of an inadequate written statement must be in addition to any compensation the employee might receive for unfair dismissal.[61]

2. ELIGIBILITY

As regards the eligibility of the employee to present a complaint to the Industrial Relations Court employees in certain classes of employment may be said to have been excluded from entitlement to complain of unfair dismissal. For instance, this may be said to be true of employees covered by a designed dismissal procedure agreement. Typical of the Zambian situation in this case

---

[61]Ibid

is Section 2 of the Act[62] which excludes the Zambia Defence Force, Zambia Police Force, the Zambia Prison Service, the Zambia Security Intelligence Service and Judges from being eligible to present a complaint to the Industrial Relations Court. Equally, the death of the employee should not extinguish his claim for unfair dismissal.

Another test of eligibility is whether the complaint is presented at the proper time. Under Section 108(2) of the Act[63] the complainant is required to lay the complaint before the court within thirty days provided the court may extend the thirty-day period for a further three months after the date on which the complainant has exhausted the administrative channels available to him. However, this provision does not seen to be clear on whether or not the complaint may also be presented before the effective date of dismissal. If not, this may suggest that in the case of a dismissal with notice the employee must wait until the notice period expires. There is therefore need for legislation to expand the jurisdiction of the Industrial Relations Court to consider complaints by allowing an employee to present a complaint of unfair dismissal at anytime after notice of dismissal has been given though the notice period has not expired.

With reference to dismissal with notice, the types of dismissal that entitle an employee to complain of unfair

---

[62]Industrial and Labour Reactions Act, 1993

[63]Ibid

dismissal include termination by the employer with notice, termination without notice, expiry of a fixed term contract without renewal and constructive dismissal. There is need for the introduction of changes to the rights of employees in the vent of dismissal with notice. One of these changes is one that should affect the date on which the dismissal is deemed to occur.

3. EFFECTIVE DATE OF DISMISSAL

On the question of what the effective date of dismissal should be, it may be said that in a case where notice is required to be given to the employee as under Section 20 of the Employment Act[64], the date at which that notice would expire if duly given should be the effective date of dismissal regardless of whether the employment was terminated by the employer without notice or without proper notice. However, this definition should not affect the effective date of dismissal in the rare instance where the employment in terminated by mutual agreement by the parties to the contract of employment.

Consequently, it should be only where the employer is contractually entitled to dismiss without notice that the effective date of dismissal need to be the date when employment actually ceases for the purpose of determining the employee's entitlement in a complaint of unfair dismissal.

---

[64]Chapters 512 of the Laws of Zambia

It is noteworthy that an order of re-instatement maybe defined as an order that the employer should restore the employee to his former position treating him in all respects as if he had never been dismissed. This would include arrear of pay, any rights privileges including seniority and pension rights and improvements in terms and conditions of employment that would have benefit ed the employee had he not been dismissed. On the other hand, an order of re-engagement can be said to consist of an order to the same employer, his successor or any associated employer to take the employee back on the same job or other suitable employment. The Industrial Relations court has discretion to specify the terms upon which the employee is to be re-engaged including arrears of pay for the interim period and any right which must be restored to the employee[65]

Meanwhile under Section 108 (3) of the Act[66] employees who are found by the Industrial Relations Court to have been unfairly dismissed are entitled to an order of re-instatement or of re-engagement in accordance with the gravity of the circumstances of each case. Otherwise the Court is required to grant to the complainants damages or compensation for loss of employment, as provided for under Section 108(3)(a) of the said Act[67].

---

[65]S.D. Anderman, Employment protection, Butterworths 1st Edition, London, 1976 P19

[66]Industrial and Labour Relations Act 1993

[67]Ibid

But although the remedy that will issue from the industrial Relations Court will take the form of an order of re-instatement or re-engagement, in reality the said directive may be said to be more of a recommendation than an order. This is for the obvious reasons that such an order is rarely made because its enforcement is subject to its practicability and the fairness of making such an order. In other words, the order is given subject to the practicability of the employer to comply with order in accordance with equity. Further more, the wish of the employee must be given weight by the court in dealing with the appropriate remedy. Moreoever, consideration of whether the employee caused or contributed to the extend of the dismissal is taken.

In view of the foregoing, there is compelling need for the only other alternative remedy to be strengthened, that is, by increasing the measure of compensation .

4. SANCTIONS AGAINST INDUSTRIAL ACTION

Under Section 101 of the Act[68] there is prohibition that the employer should not participate in lockouts. Similarly the same provision prohibits the employee taking part in strike. However, these prohibitions are not effected if the acts of both employer and employee are in manner provided for under the Act[69]. But it

---

[68]Ibid

[69]Ibid

is interesting to note that this provision does not seem to be clear on two issues. First, whether or not the court should determine the fairness or unfairness of certain of the Industrial sanctions applied by the employer on the employee. Secondly, the position in a situation where the employer exercises industrial sanctions selectively is not clear. For instance, where the dismissal is of fewer than all of the employees who were participating in an industrial action or by offering re-employment after a lock out or strike to fewer than all the relevant employees. It is suggested, therefore, that in both these cases, the Industrial Relations Court must determine the fairness of the employer's sanction, whether or not the employer was motivated by Trade Union activities or another in admissible reason.

It follows therefore that there is need for clarity on the above mentioned issues. This could be achieved by enacting a clear provision and including it to Section 101 of the Act so as to give it the effect that all cases of selective dismissal or non-re-engagement for participation in industrial action be heard by the Industrial Relations Court, whether or not that dismissal was for an "inadmissible" reason. However, it should be open to the court what criteria to use to determine when discrimination or selectivity is fair or unfair.

II CONCLUSION

The aim of this essay has been to show the inadequacy of Zambia's legislation on unfair dismissal In view of the inadequacy o four legislation on unfair dismissal and given the socio-economic environment obtaining in Zambia today, it is proposed that first, there be legislated Unfair Dismissal Act to regulate unfair dismissal issues; secondly, there be enacted a law to provide for the establishment of industrial tribunals in each province. In the alternative, it is proposed that the operations of the Industrial Relations Court be decentralized to facilitate accessibility and ensure speedy disposal of dismissal cases in areas other than Lusaka.

BIBLIOGRAPHY

1. Aikin O., Greenhalgh, Law and Employment, Cromwell Press Limited, Wiltshire, 1992.
2. Anderson S.D., Employment Protection, Butterworths, London, 1976.
3. Anderman S.D. The Law of Unfair Dismissal, Butterworths London, 1985.
4. Baker J.H., An Introduction to English Legal History, Butterworths, London, 1971
5. Colins H., The Law of Termination of Employment, Clarendon Press, Oxford, 1992
6. Ewing K.D. The Right to Strike, Clarendon Press, Oxford, 1991
7. Hepple B.A. and O'Higgins P., An Introduction to Individual Employment Law, Sweet and Maxwell, London, 1971
8. Hornby A.S. , Gratenby E.V. Wakefield H., The Advanced Learner's Dictionary of Current English, Oxford University Press, London, 1970
9. Jackson D. Unfair Dismissal, Cambridge University Press London, 1975.
10. Selwyn N.M., Law of Employment, Butterworths London, 1980
11. Turner H.A., Clark G. and Roberts G., Labour Relations in the Motor Industry, Allen and Unwin, London, 1967.